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In the

Supreme Court of the United States

SUSAN TAVE ZELMAN, et al.,
Petitioners,
v.
DORIS SIMMONS-HARRIS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF IRA J. PAUL AND ROBERT N. WRIGHT, FLORIDA PUBLIC SCHOOL TEACHERS; INDEPENDENT VOICES FOR BETTER EDUCATION; TEACHERS FOR BETTER EDUCATION; THE JAMES MADISON INSTITUTE; PACIFIC RESEARCH INSTITUTE; AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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32 pp

QUESTION PRESENTED

Does the Establishment Clause of the First Amendment prohibit Ohio's Pilot Scholarship and Tutorial Program, its school choice program, from authorizing parents to use tax-funded scholarships at any private school, whether religious or not?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. THIS COURT SHOULD OVERTURN *LEMON v. KURTZMAN* 11

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results in Aid to Education Cases 11

B. This Court's Failure to Overrule *Lemon* Has Resulted in a Two-Tiered System of Establishment Clause Jurisprudence 16

C. The Decaying *Lemon* Precedent Has Created Confusion Among the Lower Courts as to Which Line of Cases to Apply 20

II. PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF SCHOOL CHOICE PROGRAMS 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Agostini v. Felton, 521 U.S. 203 (1997) ..... *passim*

Aguilar v. Felton, 473 U.S. 402 (1985) 18

Bagley v. Raymond School Department, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999) 21

Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968) 12-13

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 9, 17, 23

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994) 21

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 7, 12-13, 22

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) 12

Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947) 10, 12, 23

Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) 19

Holmes v. Bush (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110) 1, 15

Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998) 21

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999) 21

TABLE OF AUTHORITIES—Continued

Page

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Meek v. Pittenger, 421 U.S. 349 (1975) 19

Mitchell v. Helms, 530 U.S. 793 (2000) ..... *passim*

Mueller v. Allen, 463 U.S. 388 (1983) 9, 22, 25

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 3, 23

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 6, 21

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) 5-8, 20, 24

Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) 21

Widmar v. Vincent, 454 U.S. 263 (1981) 25

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) ..... *passim*

Wolman v. Walter, 433 U.S. 229 (1977) 19

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) ..... *passim*

United States Constitution

Amend 1 6

Statutes

Ohio Revised Code 3313.975(A) 5

3313.976(A)(1)(3) 5

3313.976(C) 5

3313.978(A) 5

TABLE OF AUTHORITIES—Continued

Page

3313.979 5

Rules

Supreme Court Rule 37 1

Rule 37.6 1

Miscellaneous

Bodemer, Jo Ann, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 St. John's L. Rev. 273 (1996) 3, 11, 15

Fridy, Matthew D., *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 Cumb. L. Rev. 709 (2000/2001) 3, 15

Shokraii Rees, Nina, *School Choice 2000* (The Heritage Foundation 2000) 3

National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) 26

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Ira J. Paul and Robert N. Wright, Florida public school teachers; Independent Voices for Better Education; Teachers for Better Education; The James Madison Institute; Pacific Research Institute; and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners, Susan Tave Zelman, *et al.*[1] Consent to the filing of this brief has been granted by counsel for all parties. Copies of the general letters of consent have been lodged with the Clerk of the Court.

Amici Ira J. Paul and Robert N. Wright are teachers in the Florida public schools and members of Amicus Independent Voices for Better Education, a nonprofit, tax-exempt Florida corporation. Amicus Independent Voices for Better Education together with Teachers for Better Education, its affiliate, have more than 1,000 members and supporters consisting of parents and teachers. These groups were formed to improve the quality of education in Florida's public schools. The education reforms they advocate include: limited class size, funding classrooms before administrative functions, the elimination of teacher tenure, meaningful teacher competency testing, and vouchers for low-income families.

Amici Ira J. Paul, Robert N. Wright, Independent Voices for Better Education, and Teachers for Better Education, are also amici curiae in *Holmes v. Bush* (Circuit Court of the Second Judicial Circuit for Leon County, Florida, Case Nos. CV 99-3370, CV 99-4110). *Holmes v. Bush* involves a challenge to Florida's opportunity scholarship program—a school choice plan substantially similar to the Ohio Scholarship Program at issue in this case—as violating the federal

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Establishment Clause and state law. The Florida A-Plus program has motivated failing schools to improve their academic performance. Under this program, each public school is assigned a grade, "A" through "F", based on the proportion of its students passing the Florida Comprehensive Assessment Test. Students attending schools that receive two "F" grades in four years are eligible to receive vouchers that enable them to attend private schools or to transfer to another public school. Currently, more than 50 students in Pensacola are attending private schools through this program, and more than 70 Pensacola students are using the program to attend higher-performing public schools. Significantly, since the implementation of the Florida A-Plus choice and accountability program two years ago, the number of failing public schools in Florida has dropped from 78 to only 4. Nina Shokraii Rees, *School Choice 2000* at v-vii (The Heritage Foundation 2000). Clearly, the prospect of having vouchers offered to their students has had a positive impact on improving Florida's public schools. As amici, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright support the school choice program before the Florida court.

Amicus The James Madison Institute is a Florida based nonprofit, nonpartisan, research and education organization. It has published many papers and articles on school choice, charter schools, education vouchers, and other school reform issues and has served as an information resource for education practitioners in these substantive areas. It is dedicated to advancing economic freedom, limited government, federalism, traditional values, the rule of law, and individual liberty coupled with responsibility.

Amicus Pacific Research Institute for Public Policy (Institute) promotes the principles of individual freedom and personal responsibility. The Institute believes that these principles are best encouraged through policies that emphasize

a free economy, private initiative, and limited government. By focusing on public policy issues such as education, the Institute strives to foster a better understanding of the principles of a free society among leaders in government, academia, the media, and the business community. Towards this end, the Institute works to provide all parents the basic right to choose the best educational opportunities for their children. Through research and grassroots outreach, the Institute advances parental choice in education, high academic standards, charter schools, teacher quality, and school finance reform.

Amicus Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation affecting the public interest. PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of the First Amendment to the United States Constitution will be of assistance to this Court in its deliberations. PLF has participated in numerous cases before this Court including *Mitchell v. Helms*, 530 U.S. 793 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). PLF participated in this case as amicus curiae in the court below and, along with amici Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, and Robert N. Wright, filed a brief amicus curiae in support of the petition for writ of certiorari.

Amici are interested primarily in improving the quality of educational opportunities offered to children from low-income families. They believe that the solution to the crisis in education must include school choice programs. Among the many proposals offered to improve the quality of education, school voucher programs are emerging as the preferred option. *See* Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 St. John's L. Rev. 273, 285-86 (1996); Matthew D. Fridy, *What*

Wall? Government Neutrality and the Cleveland Voucher Program, 31 Cumb. L. Rev. 709, 710-13 (2000/2001). School voucher programs allow families with school-age children to have a voucher worth a particular amount of public tax money for the purpose of sending their children to the family's school of choice, regardless of whether it is a public school, a nonsectarian private school, or a religious school. As the Florida A-Plus program demonstrates such programs can motivate failing public schools to improve their academic performance. Unfortunately, these innovative and promising proposals have encountered a wall of resistence created by a tortured and inconsistent Establishment Clause jurisprudence. Until this wall is breached, widespread implementation of these desperately needed education reforms will be impossible. Educators understand that adopting such programs will only embroil them in costly and divisive litigation. This Court should open the doorway which will allow broad implementation of school choice proposals by overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and confirming that *Agostini v. Felton*, 521 U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793, embody the Establishment Clause analysis applicable to school choice programs.

STATEMENT OF THE CASE

Factual Background. In the summer of 1995, the Cleveland City School District was one of the most troubled urban school districts in the nation. A public school student's prospect of getting a decent education was dismal. Susan Tave Zelman, et al., Petition for a Writ of Certiorari (Zelman Petition) at 2. In March, 1996, the State Auditor noted that only "9% of the district's high school students had passed all four sections of Ohio's ninth grade proficiency test." *Id.* (citing Cleveland City School District Performance Audit, March 15, 1996). Most of the district's families with school-age children were economically disadvantaged. *Id.* at 3.

Responding to the education crisis, Ohio's General Assembly adopted the Pilot Project Scholarship Program (Scholarship Program or Program) to address the educational crisis within the Cleveland City School District. *Id.* The Scholarship Program first went into effect in the Fall of 1996. It established a pilot project for *any* school district in the state that has been the subject of a federal court order " 'requiring supervision and operational management of the district by the state superintendent.' " *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000) (citation omitted). Cleveland is the only school district presently in this category.

The Scholarship Program provides scholarships to children residing in the Cleveland school district and enrolled in kindergarten through eighth grade. Ohio Revised Code (R.C.) 3313.975(A). In admitting students to the program, preference is given to students from low-income families, which the program defines as families whose income is below 200% of the poverty line. R.C. 3313.978(A).

The Scholarship Program permits the participation of all private schools, whether religious or nonreligious, if they are located within the boundaries of the Cleveland school district and meet the state's secular standards for providing an adequate education for all children in the state. R.C. 3313.976(A)(1)(3). Each scholarship awarded is payable to the parents of the student entitled to the scholarship, to be used at whichever participating school has been selected by the student's parents. R.C. 3313.979. The Program also permits public school districts adjacent to the pilot project district to participate in the Program and "receive scholarship payments on behalf of parents." R.C. 3313.976(C).

Proceedings Below. In 1996, soon after the Scholarship Program was enacted, it was challenged as violating the Establishment Clause of the United States Constitution's First

Amendment[2] and state law in state court by individuals and the Ohio Federation of Teachers. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The Ohio Supreme Court found the program constitutional under the First Amendment's Establishment Clause for two reasons: First, it is perfectly neutral. There is nothing about the program that prevents a school from participating, or facilitates its participation, based on its status as religious or nonreligious, private or public. Second, not one penny of state money goes to a religious school except through the individual choices of participating families. No child is assigned to a religious school—and therefore, no program revenues are received by religious schools—except through the intervening personal choice of the student's parents.

The Ohio Supreme Court's affirmation of the constitutionality of the Program was based on a careful review of this Court's Establishment Clause jurisprudence. The court relied primarily on *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and the modified *Lemon* test announced in *Agostini v. Felton*, 521 U.S. 203. However, the Ohio high court found the adoption of the Ohio Scholarship Program had violated the single-subject rule of the state constitution. *Simmons-Harris v. Goff*, 711 N.E.2d at 216.

The Ohio State General Assembly cured the deficiency and re-enacted the Program in all pertinent respects in 1999. *Simmons-Harris v. Zelman*, 234 F.3d at 949-50. Some of the same plaintiffs then filed a second lawsuit challenging the program in *federal* court. *Id.* On December 11, 2000, by a 2-1 vote, the Sixth Circuit Court of Appeals, in the opinion below, affirmed a permanent injunction preventing the State of Ohio from operating the Scholarship Program. Relying on the test set

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[2] The First Amendment of the United States Constitution states, in pertinent part, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. 1.

out in *Lemon v. Kurtzman*, 403 U.S. at 612-13, the court of appeals held that the Program violates the Establishment Clause on the grounds that it has the primary effect of advancing religion and that it constitutes an endorsement of religion and sectarian education. *Simmons-Harris v. Zelman*, 234 F.3d at 961.

The lower court looked to the decisions issued by this Court applying the *Lemon* test and determined the "most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)." *Simmons-Harris v. Zelman*, 234 F.3d at 953. In *Nyquist*, this Court invalidated a tuition-reimbursement and tax credit program where public education assistance was made available to parents of children in *private* schools. 413 U.S. at 780. The *Nyquist* Court recognized that such a narrow class of recipients "cannot be squared with the principle of neutrality established by the decisions of this Court." *Id.* at 793. As the dissent below noted,

> [t]he purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the **public schools** in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Simmons-Harris v. Zelman, 234 F.3d at 964-65 (Ryan, J., dissenting).

The Sixth Circuit rejected the Ohio Supreme Court's reasoning that "'the *Nyquist* holding [had been] undermined' by subsequent cases and was thus no longer good law." *Simmons-Harris v. Zelman*, 234 F.3d. at 949 (citation omitted). Instead, the court below noted that "[t]he Supreme Court has not

overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses," *id.* at 952, and read this Court's recent pronouncements as illustrating the "flexibility" of the *Lemon* test. *Id.* at 953.

The Sixth Circuit also recognized that this Court's decision in *Mitchell v. Helms*, 530 U.S. 793, was sharply divided. Instead of applying Justice Thomas' plurality opinion upholding the constitutionality of a federally mandated Louisiana program in which the principles of neutrality and private choice were emphasized, the Sixth Circuit applied Justice O'Connor's narrow opinion concurring in the judgment. *Simmons-Harris v. Zelman*, 234 F.3d at 957. Thus, according to the court below, *Mitchell* requires an inquiry into whether state funds have been diverted to religious uses. *Id.* But this type of diversion inquiry is applicable only in the context of a public program in which the government provides funds directly to religious schools. The diversion inquiry does not apply when the program instead gives funds to the "student beneficiary" who "can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education." *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring).

Despite the urging of the dissenting judge to take the case for *en banc* review because of the "immense importance to the Cleveland children who are directly affected, and indeed to the nation," *Simmons-Harris v. Zelman*, 234 F.3d. at 974 (Ryan, J., dissenting), the Sixth Circuit denied the motion.

On September 25, 2001, this Court granted the writ of certiorari in this case.

SUMMARY OF ARGUMENT

Thirty years ago in *Lemon v. Kurtzman,* this Court articulated a three-part test to evaluate possible Establishment Clause violations. *Lemon* stated that to pass constitutional

muster under the Establishment Clause a statute or government action must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout this country will continue to struggle with *Lemon*'s imprecise test.

While this Court has not formally repudiated *Lemon*, its recent decisions have failed to rely on the three-pronged test set forth in that decision. Instead of passing Establishment Clause claims through the three prongs of *Lemon*, this Court has applied a variety of alternative tests. *See Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (whether the government's action was a neutral benefit available to all handicapped children); *Mueller v. Allen,* 463 U.S. 388 (1983) (whether the aid program was neutral toward religion instead of focusing on the actual effect of the aid); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (whether the act is neutral towards religion); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (whether the aid is provided for the benefit of all students).

Although this Court modified the *Lemon* test in *Agostini v. Felton*, 521 U.S. 203, it did not expressly overrule *Lemon*. As a consequence, educators trying to improve the public education system in this country and the nation's lower courts must struggle to apply the confusing and indeterminate *Lemon* test, only to have this Court review those decisions under different constitutional standards. An inefficient and unpredictable two-tiered system of Establishment Clause jurisprudence has emerged with this Court analyzing a program differently than the lower courts. This uncertainty in the standard of review to be applied has constructed a wall of resistance to innovative, meritorious school choice programs.

The overruling of *Lemon* would establish a uniform standard of constitutional review.

In recent Establishment Clause cases, this Court has explained that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit. *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1. This Court should expressly declare that the neutrality test laid out in *Agostini*, and not the test announced in *Lemon*, should be used to determine whether the Constitution has been violated. School choice programs that are neutral with respect to religion and where funds are directed to religious schools only through the private and independent decisions of individual parents do not violate the Establishment Clause. General government programs which distribute benefits to any qualifying child without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends and which provide parents the freedom to select a school of their choice ensure that a government benefit will be present in a sectarian school only as a result of the private decision of individual parents. Any government aid that goes to a religious institution does so only as a result of the independent and private choices of parents. The Scholarship Program in the case at bar neutrally provides a benefit to the educationally deprived children of Ohio, and thus does not violate the Establishment Clause.

ARGUMENT

I

THIS COURT SHOULD OVERTURN *LEMON v. KURTZMAN*

This Court's Establishment Clause jurisprudence remains in disarray even after its decisions in *Agostini v. Felton*, 521 U.S. 203, and *Mitchell v. Helms*, 530 U.S. 793. Although *Agostini* was heralded by legal scholars as eliminating the inconsistency of Establishment Clause jurisprudence,[3] the meaning of *Agostini* is not clear. In fact, the subsequent decision in *Mitchell v. Helms* shows that this Court itself is divided on how to interpret and apply *Agostini*. Justice Thomas, writing for a plurality of four in *Mitchell*, cited *Agostini* as establishing that "aid that is offered to a broad range of groups of persons without regard to religion" is neutral and therefore constitutional. 530 U.S. at 800. However, Justice O'Connor disagreed, stating that "[the Court] has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor, J., concurring).

The unresolved inconsistency surrounding this Court's Establishment Clause jurisprudence results directly from the doctrinal deficiency of the three-part test of *Lemon v. Kurtzman* that guides government aid to education cases. For the reasons that follow, this Court should explicitly overrule *Lemon*.

A. The Application of the *Lemon* Test Has Led to Inconsistent and Confusing Results in Aid to Education Cases

This Court has recognized that the Establishment Clause raises difficult issues of interpretation, and cases arising under it "have presented some of the most perplexing questions to

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[3] *See, e.g.*, Jo Ann Bodemer, *supra*, at 298-99 and n.127.

come before [the] Court." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 760.

Thirty years ago in *Lemon v. Kurtzman*, this Court formulated a three-part test for determining whether state and federal aid to sectarian schools complies with the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citations omitted). Yet, this Court candidly admits that in applying the *Lemon* test, it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Not surprisingly, even this Court has had trouble applying the *Lemon* test in the area of public aid to education programs involving religious schools. Not only are the cases inconsistent with each other, but they contradict cases decided prior to the adoption of the *Lemon* test.

In 1947, this Court in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, upheld a New Jersey statute authorizing local school districts to reimburse parents for the cost of transporting their children to and from school on public transportation. *Id.* at 17. The reimbursement was available to all parents irrespective of whether their children went to public or private schools. The Court recognized that general welfare programs neutrally benefitting all persons did not offend the Establishment Clause. *Id.* at 18.

Twenty-one years later, in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), this Court upheld the constitutionality of a New York statute that required public schools to loan textbooks free of charge to all students, including students attending parochial schools. *Id.* at 238. The *Allen* Court found that the New York statute was a part of a neutrally applied general welfare program. The statute neither

advanced nor inhibited religion because the textbooks were merely lent to parochial schools as part of a general program to benefit all schoolchildren regardless of the school attended. *Id.* at 243-44.

In the 1970s, however, this Court moved away from applying a neutrality test to aid to education programs. In *Lemon*, the Court examined the constitutionality of a program loaning secular textbooks to private schools and providing salary supplements for teachers. The Court began its inquiry by confessing that

> [c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

Lemon, 403 U.S. at 612. Relying on *Allen*, the *Lemon* Court found that the loan of textbooks was constitutional, while simultaneously holding that the salary supplements resulted in excessive entanglement with religion. 403 U.S at 614.

This Court's subsequent use of the *Lemon* test has resulted in inconsistent and contradictory holdings. For example, applying *Lemon* in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, this Court held unconstitutional a New York program that provided cash for maintenance and equipment to private schools serving low-income families. The program also provided a partial tuition reimbursement to low-income parents of students in private schools and a tax deduction for other parents of private school students. *Id.* at 764-69. The *Nyquist* Court held there was no way to ensure that the moneys received pursuant to the tuition-reimbursement portion of the program, even though received directly by the parents and only indirectly by the schools, would be restricted to secular purposes. *Id.* at 756.

Another example is *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481. There, this Court overturned the Washington Supreme Court and sustained a program that used government funds to provide vocational rehabilitation services to a blind student attending a Christian college. Reaffirming that "the lines of demarcation in this extraordinarily sensitive area of constitutional law" have been only dimly perceived, *id.* at 485 (quoting *Lemon v. Kurtzan*, 403 U.S. at 612), this Court found no Establishment Clause violation because the aid did not directly subsidize religion. *Id.* "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487.

In *Agostini v. Felton*, 521 U.S. at 203, this Court retooled the *Lemon* test, holding that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees" who are monitored for religious neutrality in monthly visits. *Agostini*, 521 U.S. at 234-35. The *Agostini* Court stressed that it was not revising "the general principles we use to evaluate whether government aid violates the Establishment Clause." *Id.* at 222. *Agostini* simply modified the analytical framework of the *Lemon* test.

The confusion of Establishment Clause jurisprudence was highlighted by this Court's application of the retooled *Lemon* test announced in *Agostini* to the school aid program addressed in *Mitchell v. Helms*, 530 U.S. 793. The plurality opinion in *Mitchell* applied these tests in a narrow fashion, reaffirming that neutrality would be established if the aid flowing to the

religious institution was the result of the private decisions of individuals, not the state. Justice O'Connor, concurring in the judgment, disagreed, stating that "[the Court] has never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor, J., concurring). As explained in Part "C" below, in the aftermath of *Mitchell*, lower courts have declined to follow *Mitchell*'s plurality opinion and refused to apply the retooled *Lemon* test announced in *Agostini*, opting instead to follow the discredited three-part test of *Lemon v. Kurtzman*. This uncertainty in the standard of review to be applied has constructed a wall of resistance to innovative, meritorious school choice programs.

Voucher programs have been introduced in over twenty state legislatures since the early 1990s, most failing, but a few, like the Scholarship Program at issue here, have passed successfully through the legislative process only to become embroiled in costly and divisive litigation.[4] Similarly, immediately after Florida's opportunity scholarship program was enacted in 1999, it was embroiled in litigation involving whether the program violates the Establish Clause. *Holmes v. Bush*, Case Nos. CV 99-3370, CV 99-4110. Although Florida's school choice and accountability program demonstrates that failing public schools in Florida can be motivated to improve their academic performance as a result of the adoption of school choice programs, the program's success and ability to continue is dependent upon which line of cases the trial court will follow and which line of cases the trial court will discount. This uncertainty in the standard of review to be applied to school choice programs leaves educators with limited tools to improve the nation's failing public education system *Lemon* should be

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[4] *See*, Fridy, *What Wall? Government Neutrality and the Cleveland Voucher Program*, 31 Cumb. L. Rev. at 712; Bodemer, *School Choice Through Vouchers*, 70 St. John's L. Rev. at 286-87.

overruled in order to provide a uniform framework for the evaluation of claims brought under the Establishment Clause.

B. This Court's Failure to Overrule *Lemon* Has Resulted in a Two-Tiered System of Establishment Clause Jurisprudence

The uncertainty surrounding the applicability of *Lemon* has resulted in a two-tiered system of Establishment Clause jurisprudence, with lower courts applying the *Lemon* framework and this Court applying a more flexible test. The discordant results achieved by this split-level system can be seen by evaluating this Court's more recent Establishment Clause cases.

Zobrest v. Catalina Foothills School District, 509 U.S. 1, involved a challenge by a deaf student to a school district's refusal to provide him with a sign-language interpreter to aid in his studies at a parochial high school. The school district contended that the Establishment Clause prohibited it from providing the requested interpreter. The Ninth Circuit applied the *Lemon* test and concluded that the placement of the interpreter in the parochial school would violate the Establishment Clause. *Id.* at 5. This Court reversed that ruling because the provision of interpreters was a neutral benefit available to all handicapped children in the school district, regardless of the sectarian or nonsectarian nature of the school; thus, the Establishment Clause was not violated. *Id.* at 10.

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion" it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Zobrest, 509 U.S. at 10 (quoting in part *Witters v. Washington Department of Services for Blind*, 474 U.S. at 488).

This Court employed a similar analysis in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687. There, taxpayers brought an action challenging the constitutionality of a New York statute that created a special school district for members of an Hasidic Jewish community. The state trial court found that the statute failed all three prongs of the *Lemon* test and, therefore, violated the Establishment Clause. *Id.* at 695. The state appellate court agreed. *Id.* Although this Court ultimately agreed with the conclusion of the lower courts, it did so by employing a wholly different analysis. Instead of applying *Lemon*, this Court rested its decision on the fact that the statute in question extended a governmental benefit in a nonneutral fashion. *Id.* at 710.

The judicial inefficiency of using one test throughout the lower courts, only to modify the analysis when the case reaches the Nation's highest court, was not lost on the dissenting Justice.

> [T]he Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of *Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to other sound reasons for abandoning *Lemon*, it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.

Id. at 750-51 (Scalia, J., dissenting) (citations omitted).

This two-tiered standard was dramatically highlighted in *Agostini v. Felton*, wherein petitioners sought to have this Court reconsider its earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court applied *Lemon* to bar New York City from sending public school teachers into parochial schools to provide remedial education for disadvantaged children under a congressionally mandated program. *Id.* at 404. This ruling forced school districts throughout the nation to seek creative ways to provide sorely needed educational assistance to children attending parochial schools. *Agostini*, 521 U.S. at 213.

Frustrated with the exorbitant costs of maintaining this program, New York City, along with parents of parochial school students in *Agostini*, brought a motion seeking relief from the permanent injunction imposed under *Aguilar*. The Second Circuit Court of Appeals observed that the landscape of Establishment Clause jurisprudence had changed, but felt bound by the precedent of *Aguilar*. *Id.* at 212. Granting certiorari in *Agostini*, this Court announced a new, modified *Lemon* test. "[A] federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here." *Id.* at 234-35. Unfortunately, this Court did not expressly overrule *Lemon*.

A similar frustrating result occurred in *Mitchell v. Helms*, 539 U.S. 793. There, the lower court was asked whether federally-funded programs that provided special education teachers, instructional materials, and transportation services to students in both public and private schools under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 violated the Establishment Clause. The Fifth Circuit Court of Appeals acknowledged that it was faced with a dilemma because this Court has not abandoned, nor even fundamentally changed, the *Lemon* test used to evaluate whether government

aid violates the Establishment Clause. In fact, it acknowledged this Court's admonition to lower courts to abide by any applicable holding of this Court even though that holding might seem inconsistent with subsequent decisions. The lower court held that, while the provision of teachers and transportation did not violate the Establishment Clause, the loaning of state-owned instructional materials to religious schools did. *Helms v. Picard*, 151 F.3d 347, 372 (5th Cir. 1998). The lower court relied on decisions of this Court that were subsequently overruled.[5]

In the *Mitchell* plurality opinion, this Court applied the retooled *Lemon* test announced in *Agostini* and reaffirmed the significance of neutrality in sustaining aid to students in religious schools. The plurality opinion candidly recognized the dilemma faced by the lower court: "The case's tortuous history... indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle." 530 U.S. at 804.

In each of these cases, the lower courts reviewed the Establishment Clause issue under the *Lemon* test, and in each instance, this Court ultimately employed a different standard to determine whether that clause had been violated. Not only is this dual regimen inefficient and confusing, it makes the level of constitutional protection indeterminate, varying according to the facts of each case. Until this Court expressly declares that *Lemon* is no longer the law, courts throughout the country will continue to scrutinize fact patterns in search of secular purposes, primary effects, and excessive entanglements in lieu of a more relevant examination of religious neutrality. This

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[5] The lower court relied primarily on *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). In *Mitchell*, this Court overruled *Meek* and *Wolman* because they were inconsistent with the reasoning set out in *Agostini*. 530 U.S. at 835.

Court should explicitly overrule *Lemon* to end the current two-tiered system of Establishment Clause jurisprudence and to hold that so long as the government provides benefits in a neutral manner, the Establishment Clause is not offended.

C. The Decaying *Lemon* Precedent Has Created Confusion Among the Lower Courts as to Which Line of Cases to Apply

Lower courts nationwide are unsure how recent Establishment Clause jurisprudence applies to school choice programs. Although this Court's recent decisions suggest that *Lemon* may have fallen out of favor with this Court, lower state and federal courts are constrained to apply the three-part test until it is expressly overruled. In *Agostini v. Felton,* this Court reminded the lower courts:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (citation omitted).

One need look no further than the facts of this case to see the strange results the *Lemon* test has generated. The Sixth Circuit relied upon the *Nyquist* decision and Justice O'Connor's narrow concurring opinion in *Mitchell* to find the Ohio Scholarship Program unconstitutional, *Simmons-Harris v. Zelman*, 234 F. 3d 945; whereas, the Ohio Supreme Court, examining the same Program, relied primarily upon *Zobrest, Witters*, and the retooled *Lemon* test in *Agostini* to find it constitutionally sound, *Simmons-Harris v. Goff*, 711 N.W. 2d 203.

The split in authority over the constitutionality of school choice programs is evident in other lower court decisions as well. The Vermont Supreme Court in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), ruled that the Establishment Clause permitted the State to reimburse parents for tuition paid to religious schools in a school district that does not maintain its own public schools but instead provides tuition for the public or private schools of the parents' choice. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998), the Wisconsin Supreme Court upheld against an Establishment Clause challenge a school choice program that, like the Ohio Scholarship Program, allows economically disadvantaged children to use public funds to pay for private school tuition. In *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999), the Arizona Supreme Court sustained under the Establishment Clause a state income tax credit for contributions to private scholarship programs.

On the other hand, other courts have found school choice programs unconstitutional. The Maine Supreme Court and the United States Court of Appeals for the First Circuit both rejected claims by families seeking reimbursement for religious school tuition in a program similar to Vermont's on the grounds that including religious schools among the range of options would violate the Establishment Clause. *Bagley v. Raymond School Department*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999).

These cases illustrate the confusion of the lower courts over how to apply this Court's Establishment Clause jurisprudence. All these cases applied the *Lemon* test and

addressed whether *Nyquist* should or should not be followed. In analyzing programs under the primary effects prong, these lower courts recognized that if there is a difference between *Nyquist* and the later *Mueller, Zobrest,* and *Witters* decisions, it lies in the weight to be given the intervention of parental choice. *Nyquist* considered this factor as "only one among many factors to be considered," 413 U.S. at 781, but held that aid was prohibited whether labeled "a reimbursement, a reward, or a subsidy." *Id.* at 786. The post *Nyquist* decisions stress the importance of neutrality.

> [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8. *Mueller* said that an "attenuated financial benefit, ultimately controlled by the private choices of individual parents" is not encompassed with the historic purposes of the Establishment Clause. 463 U.S. at 400. *Witters* stressed that any financial benefit to religious institutions was the "result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487.

Lower courts recognize that application of the concepts set forth in *Nyquist* lead to the inevitable conclusion that a school choice program will violate the Establishment Clause. But, *Nyquist* has not withstood the test of time. What has changed is this Court's articulation of "the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223. As *Agostini* and *Mitchell* illustrate, those criteria have recently come into much sharper focus--where (1) a non-religious category of benefit is (2) conferred on a neutrally defined class (3) in circumstances of true private choice, no Establishment Clause violation exists.

It is apparent that the outcome of school choice programs challenged as violating the Establishment Clause is dependent upon which line of cases the lower court chooses to follow, and which line they choose to discount. Now is the time for this Court to overturn *Lemon* and clarify that a neutral program that benefits religious schools solely as a result of independent choice does not violate the Establishment Clause.

II

PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF SCHOOL CHOICE PROGRAMS

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Education of the Township of Ewing, 330 U.S. at 18.

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

Kiryas Joel, 512 U.S. at 704.

In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. at 839, this Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."

Again, in *Agostini v. Felton*, 521 U.S. at 231, this Court emphasized that a program does not create a financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And in *Mitchell v. Helms*, a plurality of this Court observed that "we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 809 (plurality opinion).

In *Mitchell v. Helms*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. at 488, and *Zobrest v. Catalina Foothills School District*, 509 U.S. at 10). In these circumstances, "any aid. . .that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (internal citations omitted).

Had the court below applied this test, the Ohio Scholarship Program would have survived constitutional scrutiny. The focus of the program is on low income families with children trapped in the failing Cleveland public school system, and the scholarship aid is available to students regardless of the public or nonpublic nature of their school of choice. *Simmons-Harris v. Zelman*, 234 F.3d at 948. Participation in the Scholarship Program by educational institutions is based entirely on religiously neutral criteria. *Id.* at 948-49. No preference for religious schools is given; no preference for secular schools is given. *Id.*

Moreover, the Scholarship Program offers parents a range of educational options: attending a public school, attending a private school, or attending a public school outside of the Cleveland School District. It is only through the "independent and private choices" of parents that any government aid flows to a religious school. Parents decide whether to participate in the Scholarship Program and parents decide on what schools their children will attend. Because each individual parent independently directs the flow of the scholarship, public funds ultimately reach individual schools only as a result of the "genuinely independent and private choices" of parents. This Court has consistently held that when "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)) (internal citations omitted).

Amici believe that a school choice program that provides for the participation of all school children and enables their parents to select the school of their choice comes within the principle of neutrality. Yet few such programs have been introduced. The students of Florida and their schools are fortunate to have a school choice program that passed successfully through the legislative process. But like so many other innovative and meritorious programs, it was hauled into court. Like the Scholarship Program at issue here, the issue of whether it is permissible for a state to use public funds for student tuition in private schools is before the lower court. Amici urge this Court to open the doorway which will allow educators the ability to implement school choice programs by overruling *Lemon* and clarify that the neutrality test laid out in *Agostini* should be used to determine whether the Constitution has been violated.

CONCLUSION

There is little doubt that the public education system in this country is in need of reform.[6] Educators throughout this nation need the widest range of tools to provide educational opportunities for our nation's children, such tools should include school choice programs. Yet by not explicitly overruling *Lemon*, these innovative and meritorious programs will be embroiled in costly litigation over whether public funded scholarships may be used at private schools whether religious or not. By not explicitly overruling *Lemon*, this Court has condemned the lower courts to toil under the three-part *Lemon* test to scrutinize fact patterns in search of secular purposes, primary effects, and entanglements. This Court should expressly overrule *Lemon* and clarify, once and for all, that government programs that neutrally provide benefits to a large class of citizens do not offend the First Amendment simply because a religious institution might receive an indirect benefit.

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Respectfully submitted,

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[6] The 2000 National Assessment of Educational Progress disclosed that 63% of black and 56% of Hispanic fourth-graders are below the most basic levels of proficiency in reading. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (2001) at 31, 33.